United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7537

TO BE ARGUED BY:
RICHARD J. HILLER

B

P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 75-7537

ANTONIA ECHEVARRIA, individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

-against-

HUGH CAREY, individually, and as Governor of the State of New York; ARTHUR H. SCHWARTZ, individually and as Chairman of the State Board of Elections; REMO J. ACITO, individually, and as Vice Chairman of the State Board of Elections; DONALD RETTALIATA and WILLIAM H. McKEON, individually, and as Commissioners of the State Board of Elections,

Defendants-Appellants,

-and-

HERBERT FEURER, individually, and as President of the New York City Board of Elections; ALICE SACHS, ANTHONY SADOWSKI, STANLEY KOCHMAN, ELIZABETH CASSIDY, CHARLES AVARELLO and JAMES BASS, individually, and in their respective capacities as Members of the New York City Board of Elections,

Defendants.

PLAINTIFF-APPELLEE'S
BRIEF

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QUESTION PRESENTED

Whether section 186 of New York's Election Law imposes an unconstitutional durational residency requirement abridging the right to vote and penalizing freedom of travel when applied to recently arrived residents who establish voter residency after section 186's enrollment deadline, but who, nevertheless, are barred from voting in the primary preceding the next general election.

STATEMENT OF THE CASE

State defendants (hereafter "defendants") appeal from a judgment of the Southern District of New York (Weinfeld, DJ) declaring section 186 of New York's Election Law, read together with section 187, unconstitutional as applied to plaintiff and the class members she represents. The class was certified as consisting of "all New York State residents recently arrived from out-of-state who could not have enrolled timely in the Democratic Party because they do not meet the residency requirements imposed by New York Law and who have acquired, or will acquire voting residence, but who are barred, or will be barred, nevertheless, from voting in future Democratic primary elections by the operation of Section 186 of New York's Election Law" (App. 4a).

Facts and Pleadings

The facts, agreed to by the parties below, are clearly set forth in Judge Weinfeld's Opinion (App. 9a-11a). The parties also

agreed below that the matter was ripe for summary judgment (App.9a).

Opinion Below

While the final sentence of the Opinion states that: "A declaratory judgment may be entered declaring sections 186 and 187 unconstitutional as applied to plaintiff and the class members," the Opinion when read as a whole and the judgment entered (App. 4a) make clear that only section 186 "read together with New York Election Law §187" was declared unconstitutional.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY FOUND THAT ELECTION LAW §186 READ TOGETHER WITH §187 AS APPLIED TO NEWLY ARRIVED RESIDENTS IMPOSES AN UNCONSTITUTIONAL DURATIONAL RESIDENCY REQUIREMENT

The defendants initially contend that Rosario v. Rockefeller, 410 U.S. 752 (1973), is controlling, and that the District Court erred in failing to give it binding effect. But, the issue before the District Court, and now on appeal, was raised but not reached in Rosario v. Rockefeller. Id., at 759 n.9. See also Hill v. Stone, _____U.S._____, 44 L.Ed. 2d 172, 180-181 n. 9 (1975). In Rosario, the Supreme Court expressly declined to rule on the constitutionality of section 186 when applied to newly arrived residents "since the plaintiff in that action lacked standing to raise it" (App.9a). Plaintiff Echevarria, however, was not a resident of New York when the enrollment deadline under section 186 passed. She fell within the precise class of persons Rosario indicated would properly have standing to raise the claim that section 186, as applied to interstate travelers establishing new residency, imposed a durational residency requirement.

That the Court in Rosario recognized the distinguishing features of section 186 as it impacts on interstate travelers

as opposed to the petitioners before it is significant. The nub of the Rosario decision was that with respect to petitioners, section 186 did not operate as an absolute bar to vote; petitioners could have but did not enroll before the cut-off date. Here, however, it was impossible for plaintiff to timely enroll because she moved into New York State after the cut-off date. Accordingly, there was nothing she could have done - short of relinquishing her right to travel - to preserve her right to vote. Mr. Justice Stewart took great pains to point out that because Rosario did not present an absolute bar, it did not fall within the line of cases in which statutes imposing similar burdens were struck down:

> [T]he petitioners rely on several cases in which this Court has struck down, as violative of the Equal Protection Clause, state statutes that disenfranchised certain groups of people. Carrington v. Rash, 380 US 89, 13 L Ed 2d 675, 85 S Ct 775 (1965); Kramer v. Union School District, 395 US 621, 23 L Ed 2d 583, 89 S Ct 1886 (1969); Cipriano v. City of Houma, 395 US 701, 23 L Ed 2d 647, 89 S Ct 1897 (1969); Evans v. Cornman, 398 US 419, 26 L Ed 2d 370, 90 S Ct 1752 (1970); City of Phoenix v. Kolodziejski, 399 US 204, 26 L Ed 2d 523, 90 S Ct 1990 (1970); Dunn v. Blumstein, 405 US 330, 31 L Ed 2d 274, 92 S Ct 995 (1972).
>
> We cannot accept the petitioners' contention. None of the cases on which they rely is apposite to the situation here. In each of those cases, the State totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote. Id. at 756-757.

As Judge Weinfeld observed (App. 18a-19a), Mrs. Echevarria was totally denied the franchise. Thus, she stands on the same footing as those in the above cited cases.

For the same reasons, the defendants' contention that section 186 as applied to newly arrived residents is not a durational residency requirement is entirely baseless. To permit new residents to vote in the primary, it is argued, would be to accord them not equal rights, but greater rights than those residents who failed to timely enroll. (Defendants' Brief, p.8). But unlike the latter group, which really describes the class in Rosario, the class in this case did not fail to enroll, they were barred. As noted in Rosario:

> [Section 186] did not absolutely disenfranchise the class to which the petitioners belong-newly registered voters who were eligible to enroll in a party before the previous general election. Rather, the statute merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary... The petitioners do not say why they did not enroll prior to the cutoff date, but it is clear that they could have done so, but chose not to. Hence, if their plight can be characterized as disenfranchisement at all, it was not caused by §186, but by their own failure to take timely steps to effect their enrollment. (emphasis added) Id., at 757-58.

In concluding, the Court in Rosario found:

> New York did not prohibit the petitioners from voting in the 1972 primary election or from associating with the political party of their choice. It merely imposed

> a legitimate time limitation on their enrollment, which they chose to disregard. Id., at 762.

In Hill v. Stone, supra, the Supreme Court noted that section 186 had been upheld in Rosario and found not to violate the equal protection clause or the First and Fourteenth Amendment rights of association because it served the "legitimate and valid state goal" of "preservation of the integrity of the electoral process," id., at 761, and "because it imposed no special burden on any class before the Court," at 759 n.9. (emphasis added). As applied to recent arrivals on the other hand, section 186 indisputably imposes special burdens (App. 23a), and "conspicuously infringes upon basic constitutional liberty," Kusper v. Pontikes, 414 U.S. 51, 60-61 (1973).

In Kusper v. Pontikes, id., in holding that Illinois' interest in preventing "party raiding" was not sufficient to justify the substantial abridgement of a voter's First and Fourteenth Amendment rights, the Court distinguished Rosario:

> Unlike the petitioners in Rosario whose disenfranchisement was caused by their own failure to take timely measures to enroll, there was no action that Mrs. Pontikes could have taken to make herself eligible to vote in the 1972 Democratic primary.
>
> In other words, while the Court held in Rosario that the New York delayed-enrollment scheme did not prevent voters from exercising their constitutional freedom to associate with the political party of their choice, the Illinois 23-months rule clearly does just that.

As applied to newly arrived residents section 186 operates in the same manner as the 23-month rule in Kusper - it prevents voters from participating in a party primary.[1] Defendants contend that section 186 is not a durational residency requirement because "[i]t does not bar all residents from voting and does not contain a fixed durational requirement." (Defendants' Brief, p. 7). Simply because section 186 has been found to be a valid "delayed enrollment scheme" when applied to long-time residents, does not signify that it is not a durational residency requirement when applied to all newly arrived residents, who are absolutely and impermissibly disenfranchised by its application. And, merely because the length of the residency requirement imposed by section 186 is not the same from year to year, but instead varies from eight to eleven months [2] depending on the date set by the State legislature for the holding of the primary elections, does not save it. The durational residency requirement it imposes exceeds "outer constitutional limits." Burns v. Fortson, 410 U.S. 686,687 (1973).

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1 Out-of-staters who had not registered and completed enrollment by October 6, 1975 will be prevented from voting in two primary elections - the "presidential primary" scheduled for April 6, 1976 and the State party primaries yet to be scheduled by the legislature but generally held in either June or September. Not only will district delegates to the Republican and Democratic National Conventions be elected on April 6, 1976, but State and County Committee Members will be elected as well.

2 With respect to the April 6, 1976 primary, section 186 creates a six-month durational residency requirement.

POINT II

THE DISTRICT COURT PROPERLY EXERCISED ITS JUDICIAL RESPONSIBILITY IN SUBJECTING SECTION 186 TO CLOSE SCRUTINY

In finding that the possibility that new residents would be exploited to raid was minimal, the District Court was not substituting its judgment for that of the legislature, but exercising its judicial responsibility of subjecting to strict scrutiny those laws which abridge fundamental rights and create suspect classifications. The deference usually accorded to the judgments of legislators, the general presumption of the constitutionality of state statutes, and the application of the 'rational basis' standard for the distinctions made by the statute, are not applicable when a statute denies to some, but not others, the right to vote. Kramer v. Union Free School District, 395 U.S. 621, 627-628 (1969). When, as here, the statute denies the right to vote, the Court is obligated to apply an exacting standard, even assuming a legitimate interest. Id., at 632. The Court cannot permit such a statute to pass constitutional muster on grounds of reasonableness alone.

In Kramer, the Court focused on the device selected to achieve what was assumed by the Court to be a legitimate interest - limiting the franchise in school board elections to resident citizens "primarily interested" in such elections. In finding the challenged statute unconstitutional, the Court ruled that the classifications created did not "accomplish this purpose with sufficient precision to justify denying appellant the franchise." The Court disposed of

the State's argument that the judgment of the legislature should prevail, and wrote, at 633:

> But the issue is not whether the legislative judgments are rational. A more exacting standard obtains. The issue is whether the §2012 requirements do in fact sufficiently further a compelling state interest to justify denying the franchise to appellant and members of his class. The requirements of §2012 are not sufficiently tailored to limiting the franchise to those "primarily interested" in school affairs to justify the denial of the franchise to appellant and members of his class.

See, Cipriano v. Houma, 395 U.S. 701, 706 (1969); Evans v. Cornman, 398 U.S. 419 (1970).

Defendants are in error when arguing that in regulating the electoral process the State "need not use the least drastic means necessary to achieve [a] legitimate goal," but need only demonstrate that the regulatory device is reasonable and not arbitrary. (Defendants' Brief, p. 10). Although the Supreme Court determined that the State may have a legitimate interest in seeking to curtail party raiding, Rosario v. Rockefeller, 410 U.S. at 761, and although this Court found this interest to be compelling, Rosario v. Rockefeller, 458 F. 2d 649,652 (2d Cir. 1972), this does not signify, as Judge Weinfeld observed (App. 20a), that the defendants are free to select a regulatory device that merely satisfies a test of reasonableness. In ruling that the defendants in seeking to protect a compelling interest "cannot choose means that unnecessarily burden or restrict constitutionally protect activity," the District Court followed the firmly established standard applied where funda-

mental personal rights and liberties are abridged. Shelton v. Tucker, 364 U.S. 479, 488 (1960); Lovell v. Griffin, 303 U.S. 444 (1938); Schneider v. Irvington, 308 U.S. 147 (1939); NAACP v. Button, 371 U.S. 415, 438 (1963).

There is no support for the proposition advanced by defendants that a lesser standard applies in the area of voting rights. Dunn v. Blumstein, 405 U.S. 330, 343 (1975); Kramer v. Union Free School District, supra, at 628-633 (1969); Kusper v. Pontikes, supra, 58-59,61 (1973), Oregon v. Mitchell, 400 U.S. 112, 238 (1970). See also Rosario v. Rockefeller, 458 F. 2d at 653, n.4. "Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right [to vote]." Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964). Similarly, when the right to travel, another fundamental right at stake in this lawsuit, is impinged, the most exacting scrutiny is required. Memorial Hospital v. Maricopa County, 415 U.S. 250, 262-263, 268 (1974); Shapiro v. Thompson, 394 U.S. 618, 631 (1969); Dunn v. Blumstein, supra.

As Judge Weinstein noted, the sweep of section 186 is too broad and indiscriminate (App. 23a). In effect, the statute treats every person who established residency after the enrollment deadline as a party raider. Speaking of similar overbroad classifications, the Supreme Court in Shapiro v. Thompson, supra, at 631,

found that:

> [T]he class of barred newcomers is all-inclusive, lumping the great majority who come to the State for other purposes with those who come for the sole purpose of collecting higher benefits.

With statutes such as section 186,"[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." Kusper v. Pontikes, supra, at 58, quoting from NAACP v. Button, supra, at 438. See also, Dunn v. Blumstein, supra, at 343.

Defendants argue that section 186 was "designed to eliminate any possibility of large scale raiding, not minimize the risk." (Defendants' Brief, p. 9). That is simply not correct. Even when applied to those residing in the State prior to the preceding general election, section 186 does not eliminate all possibility of large scale party raiding. It merely makes such raiding more difficult, thereby minimizing it, and does so in a manner that deprives no person residing in the State before the enrollment deadline of his right to vote. Rosario v. Rockefeller, 410 U.S. at 759; Rosario v. Rockefeller, 458 F. 2d at 652-53.[3] This the defendants acknowledge, for in discussing Zuckman v. Matter of Donahue, 191 Misc. 399, 79 N.Y.S. 2d 169; mod. 244 App. Div. 216, 80 N.Y.S. 2d 698, aff. 298 N.Y. 627, 81 N.E. 2d 371 (1948) defendants recognize, as they must, that "properly enrolled persons could 'raid'." (Defendants' Brief, p.10).

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[3] "Under the New York law [section 186] a person who wanted to vote in a different party primary every year was not precluded from doing so; he had only to meet the requirement of declaring his party allegiance 30 days before the preceding general election." Kusper v. Pontikes, supra, at 60-61.

Defendants misconstrue the bases of the District Court's decision. (Defendants' Brief, p.9). Judge Weinfeld referred to the 30-day residency requirement to indicate that in Atkin v. Onondaga County Board of Elections, 30 N.Y. 2d 401 (1972), the New York State Court of Appeals found 30 days sufficient time for officials to ferret out persons who are not bona fide residents, which might include members of large scale raiding parties. Atkin was not cited because Judge Weinfeld mistakenly believed that defendants had raised an administrative burden argument.

The defendants do not challenge the accuracy of the District Court's view that "it is unrealistic to assume that many out-of-state persons will undertake the expense and suffer the inconvenience of moving to and establishing residency in New York simply so that they may raid a party's primary."[4] Instead, they argue that the reason for moving is of no import for neutral movers may be organized into party raiders. But, the absence of an intent to raid when establishing residency is not irrelevant, and buttresses a finding that the potential risk is minimal that new residents are, or may become, party raiders when considered together with other facts. It is nothing less than fantasy to believe that these potential converts can be readily identified, proselytized, and organized to create the kind of real danger necessary to justify absolutely prohibiting all interstate movers from voting. When viewed in the light of reality defendants'

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[4]This view was shared by the only other court which squarely confronted this issue. See Avrutick v. Wilson, 382 F. Supp. 984 (S.D.N.Y. 1974) vacated by stipulation Dkt. No. 74-2432 (2d Cir. August 12, 1975).

makeshift excuse for section 186's scope is clearly without foundation. Thus, the question is not simply whether party organizers can possibly build raids by converting neutral movers into party raiders. Rather, the inquiry must be whether the mere possibility and risk, however remote and minimal, that new residents could conceivably raid, warrants denying the right to vote. The District Court correctly found that it did not.

Finally, as the Supreme Court observed in Oregon v. Mitchell, supra, at 238:

> [O]nce it be determined that a burden has been placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect compelling state interests is upon the party seeking to justify the burden. See Speiser v. Randall, 357 U.S. 513, 525-526, 2 L. Ed. 2d 1460, 1472, 1473, 78 S Ct 1332 (1958).

The defendants have not met, much less even sought to bear this onus.

POINT III

THE DISTRICT COURT PROPERLY FOUND THE DEFENDANTS' CLAIMS OF STARE DECISIS AND COLLATERAL ESTOPPEL TO BE WITHOUT MERIT

Judge Weinfeld correctly disposed of defendants' arguments, which they raise again in their Brief, Point III, that at stake in this suit is the constitutionality of section 187, and not section 186. The cases[5] the defendants claimed were binding under the principles of stare decisis and collateral estoppel were all distinguished by the District Court below (App. 23a-24a, n.22). Ortner v. Board of Elections, supra, and Neale v. Hayduk, supra, both involved challenges to the "special enrollment" provisions of section 187 by persons moving intra-state from one New York county to another. Apart from the fact that different considerations may come into play and different problems posed by persons who "have been and continue to be residents," (24a, n.22) the constitutional proscriptions applicable to restrictions or burdens on persons who travel among the states or territories was not an issue in Ortner or Neale. The right to travel inter-state is clearly a fundamental right. Dunn v. Blumstein, supra, at 338-342; Shapiro v. Thompson, supra; Memorial Hospital v. Maricopa County, supra, at 256-262. Section 186 when applied to new residents creates a "suspect" classification and penalizes these residents because of their recent interstate movement. Id.

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[5] Ortner v. Board of Elections, 74 Civ. 3416 (S.D.N.Y. September 9, 1974); Neale v. Hayduk, 35 N.Y. 2d 182 (1974), app. dism., ___U.S.___, 43 L.Ed. 2d 388 (1975)(failure to timely file notice of appeal).

The intra-state movers in Ortner and Neale were not possessed of this fundamental right, and thus were not similarly penalized.

Jordan v. Meiser, 29 N.Y. 2d 661 (1971), app. dism. 405 U.S. 907 (1972) is another case inappropriately relied on by the defendants. Jordan does make clear that section 187 (6) applies to recently arrived residents, triggering the durational residency requirements imposed by section 186, and requiring a review of the effect of section 186 on new residents (App. 12a). The case is otherwise inapposite, since it only upheld section 187 as applied to prospective candidates, not voters, recently arrived from out-of-state. In Jordan, a New York state resident newly arrived from Georgia sought, but was denied, a place on the primary ballot. The rights of recently arrived residents to vote in primary elections were not in issue, and not adjudicated.

Since Dunn v. Blumstein, supra, decided subsequent to Jordan, numerous courts have readily distinguished durational residency requirements for candidates from those for voters and recognized that "the right to vote and the right to seek public office are not synonomous." Sununu v. Stark, 383 F. Supp. 1287, 1291 (D.N.H. 1974)(three-judge court) aff'd ____U.S.____,43 L. Ed. 2d 435 (1975) (New Hampshire's seven year durational residency requirement for state senate candidates upheld). See also Chimento v. Stark, 353 F. Supp. 1211 (D.N.H. 1973) (three-judge court) aff'd mem. 414 U.S. 802 (1973) (New Hampshire's seven year durational residency requirement for gubernatorial candidates upheld); Gilbert v. State, 43 U.S.L.W. 2147-8, (Alaska Sup. Ct. 1974) (Alaska's three year durational residency require-

ment for state legislators); Kanapaux v. Ellisor, 43 U.S.L.W. 3243 (1974) (South Carolina's five year residency requirement for Governor upheld) (appeal filed from unreported ruling of D.S.C., September 26, 1974), judgment aff'd, ____ U.S. _____, 42 L. Ed.2d 136 (1974).

Moreover, as the court noted in Chimento v. Stark, supra, a durational residency requirement for candidates "has only a negligible impact on the voter's right to have a meaningful choice for candidates", (at 1212)...and "its limiting effect on the voter's choice of candidates is more hypothetical than real" (at 1215-1216). And elsewhere the court opined at 1218:

> The "right of qualified voters...to cast their votes effectively" referred to in Williams v. Rhodes, supra, 393 U.S. 23,31, 89 S.Ct. 5,21 L.Ed. 2d 24 (1968) remains inviolate. While an isolated few may be temporarily precluded from seeking the office of Senator, this cannot be said to adversely affect the democratic election process or the voters' participation therein.

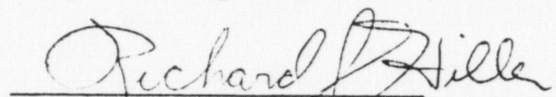
In sum, the District Court did not err in refusing to be bound by Neale, Ortner, or Jordan.

CONCLUSION

For all of the foregoing reasons the judgment below should be affirmed.

Dated: New York, New York
December 15, 1975

Respectfully submitted,



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STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

WILLIAM ROSADO, being duly sworn deposes and says:

1. I am over eighteen years of age, not a party to this action, and reside at 44 Buchanan Place, the Bronx, New York.

2. On December 15, 1975, I served the within plaintiff-appellee's brief on the following persons:

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Richard J. Fuller

Sworn to before me this
15th day of December, 1975

RICHARD J. FULLER
Notary Public, State of New York
No. 6900975
Qualified in New York County
Commission Expires March 30, 1977

William Rosado
WILLIAM ROSADO